

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE 30-92:

GREAT FALLS EDUCATION SUPPORT  
PERSONNEL ASSOCIATION, MEA/NEA,

Complainant,

- vs -

FINAL ORDER

GREAT FALLS PUBLIC SCHOOL  
DISTRICTS NO. 1 AND 1,

Defendant.

\* \* \* \* \*

The Findings of Fact; Conclusions of Law; and Recommended Order were issued by Joseph V. Haronick, Hearing Examiner, on May 26, 1993.

Complainant's Exceptions to the Findings of Fact; Conclusions of Law; and Recommended Order were filed by J. Dennis Moreen, Attorney for Complainant, on June 18, 1993.

Oral arguments was scheduled before the Board of Personnel Appeals on Wednesday, September 29, 1993 at 10:00 A.M. MDT.

After reviewing the record and considering the briefs and oral arguments, the Board orders as follows:

1. The Hearing Examiner's Finding of Fact are supported by substantial evidence and are hereby adopted.

2. The Hearing Examiner's Conclusions of Law numbers 1 through 6 are legally correct and are hereby affirmed and adopted. Conclusions of Law number 7 is not legally correct and is hereby rejected and vacated.

1           3.    The Board substitutes the following Conclusion of Law  
2 in place of that rejected in the preceding paragraph:

3           7A.   "The record presented is sufficient to show that  
4 good faith negotiations did not occur. As concluded above,  
5 the tobacco free policy and its effects are a mandatory  
6 subject of bargaining. By requiring the Complainant to enter  
7 into a separate bargaining process over this single issue  
8 (outside of the existing negotiations) the Defendant  
9 improperly established a bifurcated negotiation system. The  
10 imposition of this unilateral requirement by the Defendant  
11 constitutes a refusal to bargain in good faith."

12           4.    The Board also rejects the Order of the Hearing  
13 Examiner. In place of the Hearing Examiner's Order and in  
14 accordance with the preceding findings and conclusions, the Board  
15 order as follows:

16           IT IS ORDERED that the Defendant is guilty of an unfair  
17 labor practice for requiring two-tiered bargaining over a  
18 mandatory subject of bargaining.

19           DATED this 21<sup>st</sup> day of October, 1993.

20                               BOARD OF PERSONNEL APPEALS

21                               By Willis H. McKeon  
22                               WILLIS H. MCKEON  
23                               CHAIRMAN

24           Board members Klepper, Henry, Talcott and Schneider concur.

25                               \* \* \* \* \*

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE 10-92

GREAT FALLS EDUCATIONAL SUPPORT  
PERSONNEL ASSOCIATION, MEA/NEA,

Complainant,

vs.

GREAT FALLS PUBLIC SCHOOL  
DISTRICTS NO. 1 AND A,

Defendant.

FINDINGS OF FACT;  
CONCLUSIONS OF LAW;  
ORDER

\* \* \* \* \*

I. INTRODUCTION

On May 15, 1992, Great Falls Educational Support Personnel Association, MEA/NEA, herein after the Complainant, filed an Unfair Labor Practice Charge alleging the Great Falls Public School Districts 1 and A, hereinafter the Defendant, was violating Section 39-31-401(5), refusing to bargain in good faith, by unilaterally implementing a no smoking policy. The Defendant denied any law of violation. An Investigation Report and Determination issued by the Board on November 10, 1992, found probable merit in the charge sufficient to warrant a referral to an evidentiary hearing.

Prior to the hearing, Complainant moved to consolidate this charge with another filed November 23, 1992, involving the same Parties. The Defendant objected December 23, 1992, to charge consolidation. The November 23, 1993, charge was in board process and yet undetermined as sufficient to support referral to an evidentiary hearing. Due to status of the matter being only

1 in process, the Motion for Consolidation Request was denied by  
2 Order issued December 29, 1992.

3 A formal hearing on the above matter was conducted Janu-  
4 ary 13, 1993, in Great Falls, Montana. Parties present, duly  
5 sworn, and offering testimony included: UniServ Director, Jane  
6 Fields; Benefit Coordinator, Gwen Williams; Christie Deck, and  
7 Rick D'Hooge, Representatives of Montana School Boards Associa-  
8 tion. The Complainants were assisted in case presentation by  
9 Attorney, J. Dennis Moreen, and the Defendants by Arlyn "Butch"  
10 Plowman, Representative, Montana School Boards Association.  
11 Documents admitted to the record included Complainant's Exhibits  
12 1-28, Respondent Exhibits A-I and, through administrative notice,  
13 the charge, response, investigation report, motion and ruling.

#### 14 II. ISSUE

15 Did the Defendant refuse to bargain in good faith.

#### 16 III. FINDINGS OF FACT

17 1. The parties' Collective Bargaining Agreement (Exhibit  
18 1) was to expire December 31, 1991. On October 2, 1991, (Exhibit  
19 2) the Complainant requested negotiations. The Defendant was  
20 considering a no smoking policy and this matter identified as a  
21 bargaining subject. The Complainant intended to bargain the  
22 policy and not the effects of the policy. (Complainant's Post-  
23 Hearing Brief Page 2, Line 14-16)

24 2. The Defendant under Section 50-40-201 MCA is required  
25 to regulate smoke in work areas as follows:

#### 26 Reservation of smoking and non-smoking areas 27 in work areas in local government buildings

28 In offices and work areas in buildings main-  
tained as a political subdivision, except a  
school or community college facility desig-

1   dant had reached agreement with the Defendant regarding the  
2   tobacco free policy.

3       5.    The Defendant had established a separate bargaining  
4   team which only bargained the tobacco free school policy not  
5   other contract subject matters so that a uniform tobacco free  
6   school policy would hopefully exist with all nine of the bargain-  
7   ing units. With this intent, the defendant refused to bargain  
8   the tobacco free policy as part of other contract terms indepen-  
9   dent or without their tobacco free policy negotiating members.  
10   Some of the Defendant's tobacco free policy negotiating team  
11   members were also members of the other contract issues bargaining  
12   team. On March 23, 1992, impasse with the Complainant regarding  
13   the effects of the tobacco free school policy was declared.

14   (Exhibit D-7) On May 7, 1992, and June 19, 1992, mediation  
15   sessions between the Complainant and the Defendant were concluded  
16   without conflict resolution. On May 19, 1992, this Unfair Labor  
17   Practice Charge was filed.

18       6.    The Defendant's policy proposal changed during the  
19   process of the discussions from forbidding smoking during school  
20   hours on buildings and grounds with some employee cessation  
21   assistance to a ban at all times in school buildings and grounds  
22   still including cessation assistance but adding discipline for  
23   policy violation. (Complainant brief page 7, line 2-6)

24       7.    The Complainant contended the smoking policy implemen-  
25   tation is a substantial material change in working conditions and  
26   a mandatory subject of bargaining citing W-I Forest Products, 304  
27   NLRB 83 138 LRRM 1091 (1991). In W-I Forest, supra, a determina-  
28   tion was issued indicating that unilateral smoking bans were or

1 are a violation of the collective bargaining agreement. Based on  
2 this rationale the Complainant contends that the smoking policy  
3 was a mandatory subject of bargaining and that the school dis-  
4 trict refused to bargain this mandatory subject in good faith as  
5 required. (Page 4, brief line 10) The Defendant, according to  
6 the Claimant's argument, engaged in surface bargaining decided  
7 impasse prematurely and implemented the policy in violation of  
8 39-31-401(5). The Complainant's argument as provided in Post-  
9 hearing Brief page 4 indicates:

10 Restrictions on employees smoking in the work  
11 place are changes effecting working condi-  
12 tions. A total ban is a substantial and a  
13 material change in those working conditions.  
14 A smoking ban is a mandatory subject of bar-  
15 gaining. W-I Forest Products, 304 NLRB 83,  
16 138 1 LRRM 109 (1991). See also Fayette  
17 County Area Vo-Tech School, 94 LA 894 (1990),  
18 and Basler Electric Company, 94 LA 889  
19 (1990), where arbitrators found unilateral  
20 impositions of a smoking ban to be a viola-  
21 tion of the collective bargaining agreement  
22 in that it was a change of past practice.  
23 The District obviously was aware that the ban  
24 was a mandatory subject of bargaining, it  
25 went through the formality of surface bar-  
26 gaining in a pale attempt to meet the re-  
27 quirement.

28 The District's actions were not good faith  
29 bargaining but contrived to create an impasse  
30 so it could unilaterally implement its tobac-  
31 co ban. The District actions are an unfair  
32 labor practice in violation of Section  
33 39-31-401, MCA. If a party's bad faith bar-  
34 gaining or unfair labor practice precludes  
35 reaching an agreement, the resulting impasse  
36 is not a valid one, and any changes the party  
37 unilaterally makes are illegal. . . .

38 7. The Complainant, in part, contended the use of a sepa-  
39 rate bargaining team for only negotiations relating to the  
40 tobacco free policy which were not an integral part of other  
41 individual unit contract bargaining demonstrates a refusal to

1 bargain in good faith. Both parties claimed the other party  
2 either refused to make any proposals or counter proposals or  
3 bargain in good faith without unnecessary constraints or unalter-  
4 able positions. Both parties also found the opposing party's  
5 position or actions frustrating.

#### 6 IV. CONCLUSIONS OF LAW

7 1. The Board of Personnel Appeals has jurisdiction over  
8 this complaint under applicable Montana and Federal Labor Rela-  
9 tions Law.

10 2. The Montana Board of Personnel Appeals has held:

11 . . . A unilateral change, that is a change  
12 initiated by the employer without bargaining  
13 with the union, in a mandatory subject of  
14 bargaining is a refusal to bargain in good  
15 faith and is a per se unfair labor practice,  
16 NLRB v. Katz, 369 U.S. 736 (1962).

17 The Montana Supreme Court has approved the  
18 practice of the Board of Personnel Appeals in  
19 using federal court and NLRB precedents as  
20 guidelines in interpreting the public employ-  
21 ees collective bargaining act and the state  
22 act is so similar to LMRA State Department of  
23 Highways v. Public Employees Craft Council,  
165 Mont. 349, 529 P2d 785, 87 LRRM 2101  
(1974); AFSCME Local 2330 v. City of Bill-  
19 ings, 171 Mont. 20, 555 P2d 507, 39 LRRM 2753  
(1976); State ex rel. Board of Personnel  
20 Appeals v. District Court, 183 Mont. 23 598  
P2d 1117, 103 LRRM 2297 (1979); Teamsters  
21 Local 45 v. State ex rel. Board of Personnel  
22 Appeals, 195 Mont. 272, 635 P2d 1310, 110  
LRRM 2012 (1981); City of Great Falls v.  
23 Young (Young III), 211 Mont. 13, 686 P2d 185,  
119 LRRM 2682, (1984).

24 The Public Employees Collective Bargaining Act, follows Katz  
25 supra,

26 The U.S. Supreme Court held in 1962 that an  
27 employer's unilateral change in a condition  
28 of employment. . . may be held to violate Sec-  
tion 8(A)(5) [similar to Section 39-31-401(5)  
MCA] even in the absence of a finding that  
the employer was guilty of over-all bad faith  
bargaining because conduct amounts to a re-

1 fusai to negotiate about the matter and must  
2 of necessity obstruct bargaining, AAUP v.  
3 Eastern Montana College, ULP 2-82 (1982).

4 The Board similarly relied on Katz in finding that unilater-  
5 al imposition of an in-district residency requirement was an  
6 unfair labor practice, MEA v. Mussellshell County School District  
7 (Roundup), ULP No. 6-77 (1977).

8 Once practices are established, an employer  
9 is "required to bargain in good faith; uni-  
10 lateral changes cannot. . . even if (the prac-  
11 tices) are not contained in the contract;  
12 unless. . . there exists a waiver by the party  
13 to whom the duty to bargain is owed. In the  
14 instant case. . . (no waiver) was obtained by  
15 the Defendant prior to making the change in  
16 evaluation procedure." Bozeman Education  
17 Association v. Gallatin County School Dis-  
18 trict No. 7 (Bozeman), ULP No. 43-79 (1981).

19 3. As pointed out in Defendant's Brief:

20 In Taff Broadcasting Company, 64 LRRM 1689,  
21 143 NLRB 55, the National Labor Relations  
22 Board said:

23 An employer violates his duty to  
24 bargain if when negotiations are  
25 sought or are in progress he uni-  
26 laterally institutes changes in  
27 existing terms and conditions of  
28 employment. On the other hand,  
after bargaining to an impasse,  
that is, after good faith negotia-  
tions have exhausted the process of  
concluding an agreement, the em-  
ployer does not violate the act by  
making unilateral changes that are  
reasonably comprehended within his  
pre-impasse proposals.

29 The Board of Personnel Appeals has adopted  
30 the theory of and the test for impasse estab-  
31 lished in Taff Broadcasting, supra: See ULP  
32 7-89 and 9-89, IUOE, Local 400 and Teamsters  
33 Local 2 v. Flathead County,

34 That test is as follows:

- 35 a. the bargain history  
36 b. the good faith of the parties  
37 in negotiations,  
38 c. the length of negotiations  
(frequent, numerous, ex-



- 1           haust -- exploring all ground  
2           for settlement),  
3           d.   importance of the issue or  
4           impasse as to which there is a  
5           disagreement (mandatory sub-  
6           ject of bargaining), and  
7           e.   the contemporaneous under-  
8           standing of the parties as to  
9           the negotiations (positions  
10          solidified).

11          5.   The tobacco free policy and its effects are found to be  
12          a mandatory subject of bargaining in this case. The positions  
13          offered by the parties relating to whether or not the subject of  
14          the smoking policy and/or its effects is a mandatory subject of  
15          bargaining show that the smoking policy does involve a material  
16          change in working conditions and as such a mandatory subject of  
17          bargaining.

18          6.   The primary issue for determination in this matter is  
19          whether or not the Defendant refused to bargain in good faith.

20          7.   The record presented is inefficient to show that good  
21          faith negotiations did not occur. While the positions of the  
22          parties, as is normally the case in negotiations, involves some  
23          positioning - emphasis, statement, evaluation relating to effects  
24          or gravity; the record presented is insufficient to support a  
25          finding that the Defendant engaged in surface bargaining or did  
26          not bargain in good faith.

27          V.   **RECOMMENDED ORDER**

28          The Unfair Labor Practice Charge in this matter is hereby  
29          dismissed. The Defendant is found to have engaged in good faith  
30          bargaining regarding the smoking policy and implemented that  
31          policy after impasse had occurred.

1 VI. SPECIAL NOTE

2 In accordance with Board Rule ARM 24.25.107(2) the above  
3 RECOMMENDED ORDER shall become the FINAL ORDER of this Board  
4 unless written exceptions are filed within twenty (20) days after  
5 service of these FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOM-  
6 MENDED ORDER upon the Parties.

7 Entered and dated this 26 day of May, 1993.

8 BOARD OF PERSONNEL APPEALS

9  
10 Joseph V. Maronick  
11 Joseph V. Maronick  
Hearing Examiner

12 \* \* \* \* \*

13 CERTIFICATE OF MAILING

14 The undersigned hereby certifies that true and correct  
15 copies of the foregoing documents were, this day served upon the  
16 following parties or such parties' attorneys of record by depos-  
17 iting the same in the U.S. Mail, postage prepaid, and addressed  
18 as follows:

17 J. Dennis Moreen  
18 CHRONISTER DRISCOLL & MOREEN  
19 208 North Montana Avenue  
Helena, MT 59601

20 Arlyn "Butch" Plowman  
21 Montana School Boards Association  
One South Montana Avenue  
Helena, MT 59601

22 DATED this 26th day of May, 1992.

23  
24 Christine P. Roland  
25

26 DA321.5  
27  
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